In the Supreme Court of the United States.

OCTOBER TERM, 1911.

SAMUEL M. PLUMLEY, APPELLANT, v. THE UNITED STATES.	No. 255.
THE UNITED STATES, APPELLANT, v. SAMUEL M. PLUMLEY.	No. 256.

APPEAL AND CROSS APPEAL FROM COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is a sequel to that of P. H. McLaughlin & Co., reported in the 36th Ct. Cls., p. 138, and the 37th Ct. Cls., p. 150, and grew out of the construction of the new Naval Observatory on Georgetown Heights.

P. H. McLaughlin & Co. were the original contractors for the construction of the Naval Observatory buildings. The McLaughlin contract was declared forfeited by the Secretary of the Navy on September 8, 1891 (R., 11), and the work of completing said

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buildings was by contract let to Samuel M. Plumley, on the 16th day of February, 1892, with provision that all work covered by the McLaughlin contract and "*duly authorized changes*" should be completed "on or before the 1st day of June, 1892." (R., 1–5.)

The consideration stated in the McLaughlin contract was $307,811, and the "*authorized changes*" increased the cost of the work $7,891.13 and decreased it $2,537.78, leaving to be paid the contractors for extra work caused by the authorized changes the additional sum of $4,439.57. (R., 11.)

In addition to the cost of the extra work, as above stated, McLaughlin & Co. were paid the sum of $5,485.70 for excavating and concrete work, and to other contractors for work done in connection with the construction of the Naval Observatory buildings there was paid the sum of $32,888, which included the sum of $8,580 paid to Warner and Swasey for the shutters of the prime vertical and the three transit rooms in which was installed the ventilation system. (R., 11.)

The circular inviting proposals for the completion of the Naval Observatory buildings had attached to it a copy of the McLaughlin specifications, and stated that:

> In view of the advanced condition of the work of completion of the new Naval Observatory, and in order to furnish, as fully as practicable, such information as to the present condition of the work as may be necessary for persons desiring to submit bids therefor, numerous manuscript notes and erasures have

been made in these detailed specifications. Such alterations do not, however, constitute the "duly authorized changes in the plans and specifications" that are referred to in the proposals for the completion of the new Naval Observatory, and the advertisement inviting the same, dated January 7, 1892, but are made solely for the assistance of bidders in making their estimates. They do not impair the requirements of the specifications as set forth in this circular and as amended prior to September 8, 1891. (R., 11.)

The firm of P. H. McLaughlin & Co., the original contractors, was composed of three parties, Patrick H. McLaughlin, John G. Craig, and Augustus Davis, jr. The last named was also a partner of the claimant, Samuel M. Plumley, to the extent of owning a one-half interest in the profits to be realized on the Plumley contract. (R., 21, finding XV.)

The McLaughlin contract was by the Secretary of the Navy on September 8, 1891, declared forfeited for failure of the contractors to proceed with the work. (R., 11.)

The Plumley contract called for the completion of the Naval Observatory buildings on or before the 1st day of June, 1892, but this contract period was extended by the Secretary of the Navy to February 8, 1893. (R., 4–5, 11.)

The Plumley case was tried twice in the Court of Claims and each time judgment was rendered in favor of Plumley for $502.50, as stated in the conclusion of law on page 23 of the record, and is based upon the facts stated in finding II. (R., 12.)

As to all other items, the petition was dismissed on the authority of McLaughlin's case (37 Ct. Cls., 150).

On the 4th day of April, 1910, Plumley made application for an appeal, which was allowed (R., 27), and on April 7th the defendant made application for an appeal, which was also allowed.

ARGUMENT.

THE CLAIMANT'S APPEAL.

VENTILATION SYSTEM—4-INCH DRAIN PIPE.

Finding III sets forth all the facts relative to the installation of what is known as the ventilation system. (R., 12–17.) Some time after the work had been commenced by McLaughlin & Co. under the original contract, the architect employed by the Government to superintend the construction of the buildings submitted a change in the plans and specifications providing for a system of ventilation. These changes were set out on a paper called "Memorandum No. 1 of Proposed Changes in Plans of New Naval Observatory." The fifth paragraph of said memorandum stated that:

> Plans showing these changes are in the hands of the Superintendent of the Naval Observatory. They have been examined by the contractors (McLaughlin & Co.), who offer to make all changes according to plans and specifications prepared by me, at a total cost of nine hundred ($900) dollars. (R., 13, paragraph 4.)

Among the plans mentioned in the fifth paragraph of memorandum No. 1 (R., 13) as showing the changes

and as having been examined by the contractors, McLaughlin & Co., was plan No. 79, which shows the ventilation work in the transit buildings. The date of memorandum No. 1 is May 2, 1889. Plan No. 79 was received by the contractors February 18, 1889, and *was examined by Mr. Plumley before bidding* on the work of completing the Naval Observatory buildings.

The offer of McLaughlin & Co., mentioned in the fifth paragraph of memorandum No. 1, was made in writing, approved by a board of officers, the Bureau of Navigation, and the Secretary of the Navy, in accordance with the third section of the McLaughlin contract, which is set out in finding I (R., 9–10), and the work covered by said memorandum No. 1 was performed by the two contractors McLaughlin & Co. and Plumley, and paid for by the Government. (R., 13.)

The drawings and specifications accompanying the original McLaughlin contract did not show any provision for ventilation, but the system of ventilation installed in the Naval Observatory buildings was set out on the drawings and plans accompanying memorandum No. 1, which *were shown to the claimant Plumley when estimating before bidding.* (R., 13 and 14.)

The drawings showing the ventilation system were handed to McLaughlin & Co. with instructions by the architect *to proceed with the work, and they did so* and had installed a part of the system of ventilation without objection prior to the forfeiture of their

contract, all of which was fully known to the claimants (Samuel M. Plumley and his partner Augustus Davis, jr.) at the time the Plumley bid for the completion of the McLaughlin contract work was made and accepted. (R., 14, subfinding 3.)

Appellant Plumley was required by the contract to *complete* the system of ventilation. He protested that such work was not a part of the "*authorized changes*" referred to in paragraph 2 of his contract. The architect ruled that the ventilation work was a part of that shown in memorandum No. 1 and the accompanying drawings which McLaughlin & Co. had agreed to do for $900, and that it therefore constituted a part of the unfinished work covered by the McLaughlin & Co. contract and the "authorized changes." (R., 14.)

Plumley, under the ninth clause of his contract, appealed from the decision of the architect to the Secretary of the Navy. The Secretary of the Navy sustained the architect, and thereby decided that the work of installing the ventilation system constituted a part of the duly authorized changes shown in said memorandum No. 1 and drawings thereto attached. (R., 15.)

The McLaughlin contract and specifications were referred to and made a part of the Plumley contract. (R., 4, sec. 2.)

The third section of the McLaughlin contract required that changes *increasing or diminishing* the cost of the work must be agreed upon in writing

before taking effect, and to be approved by the Secretary of the Navy, and further—

> *Provided*, That the drawings, plans, or specifications shall not be changed in any respect when the cost of such change shall exceed five hundred dollars ($500), except upon the written order of the Secretary of the Navy, and that if changes involving an expenditure in excess of said sum thus made, the actual cost thereof and the damage caused thereby shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, and the parties of the first part shall be bound by the determination of said board or of a majority thereof as to the amount of increased or diminished compensation which they shall be entitled to receive, if any, in consequence of such change or changes. (R., 9–10.)

The ninth section of the Plumley contract provided that—

> If any discrepancy appear between the drawings, plans, specifications, proposals, letter, or contract of October 2, 1888 (McLaughlin contract), aforesaid, and this contract, the matter shall be at once referred to the Secretary of the Navy for determination, and the party of the first part hereby binds himself, his heirs, and assigns, and his personal and legal representatives, to abide by his decision in the premises. (R., 6.)

Plumley, as stated, under this section of his contract appealed from the decision of the architect to the Secretary of the Navy, who decided that the installation of the ventilation system was a part of the duly authorized changes covered by memorandum No. 1 and drawings made a part thereof. (R., 15, 19.)

On page 9 and repeated on pages 11 and 16 of brief filed herein by counsel for appellant Plumley statement is made that the work covered by memorandum No. 1 was performed by McLaughlin & Co. and paid for, reference being made to finding III, subfinding 1. (R., 13.) The said finding does not state that McLaughlin & Co. performed the work covered by memorandum No. 1. That this is true is evidenced by the fact that the Court of Claims in its opinion (R., 25, bottom of page) states that in its previous findings the court was of the opinion that memorandum No. 1 *did not include the ventilation system and was not an authorized change under the terms of the McLaughlin contract*, but after going over the records in both the McLaughlin and Plumley cases and after making a most careful comparison and examination of the plans and specifications, especially plan No. 79 construed in conjunction with the summary of changes, the court modified its findings and opinion and in this way "confirms defendants' contention that the ventilation system was included in memorandum No. 1. The court's first impression was that memorandum No. 1 was limited to the changes made in the distances between the clock

room and the east-and-west transit circle room, overlooking the summary of changes wherein these identical changes are expressly provided for." (R., 25–26.) The first impression of the court seems now to be the contention of the counsel for claimant; otherwise it would not be contended that all of the extra work covered by memorandum No. 1 was performed by McLaughlin & Co. and paid for before the forfeiture of that contract. To make this contention counsel for appellant must overlook and disregard the facts stated in finding III, last paragraph of subfinding 2 and the first paragraph of subfinding 3. The last paragraph of subfinding 2 states that—

> *said ventilation work was fully set out on the drawings and plans which were shown to the claimant when estimating before bidding as stated in subfinding 1.* (R., 13, last paragraph subfinding 1.)

The first paragraph of subfinding 3 (R. 14) is as follows:

> The drawings showing the system of ventilation were handed to McLaughlin & Co. with instructions by the architect to proceed in accordance therewith, and *they had proceeded a short distance* in the construction in accordance with said drawings at the time their contract was forfeited, all of which was fully known to claimants at the time their bid for completion of the McLaughlin contract was accepted. (Italics ours.)

It will be noted that the Court of Claims uses the word "*claimants*," while the present claimant is Samuel M. Plumley. By the word "*claimants*" the court evidently had reference to Samuel M. Plumley and Augustus Davis, jr., his partner. *Davis was also a member of the firm of McLaughlin & Co.*, and of course knew to what extent the ventilation system had been installed at the time of the forfeiture of the McLaughlin contract. In addition to this, the record fails to show that McLaughlin & Co. at any time raised the question that the installation of the ventilation system was not one of the authorized changes covered by memorandum No. 1. In this way Plumley (with his partner, Davis) had notice that McLaughlin & Co. had partly installed the ventilation system, and therefore Plumley must have known that the ventilation system was a part of the authorized changes covered by memorandum No. 1.

Knowing, as Plumley did, that the ventilation system was partly installed at the time of the forfeiture of the McLaughlin contract, he was thereby *warned* that he would be required to complete the installation of the ventilation system when he contracted to complete the Naval Observatory buildings in accordance with the McLaughlin contract and the duly authorized changes. (See case of *Hughes* v. *United States*, No. 74, October term, 1911, decided Jan. 9, 1912, pp. 3–4 of the opinion in pamphlet. See p. 16, post).

On page 13 of the brief filed herein by counsel for appellant, Plumley, statement is made that the bidders for completing the Naval Observatory buildings

"were bound to base their proposals upon the drawings, plans, and specifications annexed to the McLaughlin contract." This statement would be correct if to it were added the words "*and duly authorized changes in the plans and specifications*," as stated in the claimant's proposal for the completion of the new Naval Observatory buildings, the first and second sections of the Plumley contract (R., 4), and referred to in the circular inviting proposals for the completion of said buildings which is set out in the next to the last paragraph on page 11 of the record.

LAYING 4-INCH DRAIN PIPE.

Plumley laid 655 feet of 4-inch vitrified drain pipe. This work was performed under the direction of the officer in charge and *in accordance with his construction of the contract plans and specifications*. Plumley, however, protested in writing to the Secretary of the Navy against being required to do this work as a part of his contract. (R., 19, 22.)

Section 3 of the original McLaughlin contract required that changes before taking effect—

> must be agreed upon in writing by the parties of the first part and by the architect appointed by the Secretary of the Navy to superintend the work—the agreement to set forth fully the reason for such change or changes, to state clearly the quantities and prices of both material and labor thus substituted for those named in the plans and specifications, and, before taking effect, to be approved by the said Secretary. (R., 9.)

Plumley was required to do this work by the officer in charge, as above stated, in accordance with his construction of the contract plans and specifications. The protest made by him to the Secretary of the Navy is set out in the second section of a letter addressed by him to the Secretary under date of April 19, 1892. (Finding 7; R., 19.)

The ninth section of the Plumley contract (R., 6), hereinbefore set out, made the decision of the Secretary of the Navy final as to any discrepancy appearing between the drawings, plans, and specifications, and Mr. Plumley in that section of his contract bound himself to abide by said decision.

It is a well established principle of law, and this court has frequently so held, that it is competent for the parties to a contract similar to this to make provision that the decision of an engineer or other officer in all or specified matters of dispute which may arise during the performance of the contract work shall be final and conclusive, and that in the absence of fraud or mistake so gross as to necessarily imply bad faith such decision will not be subject to the revisory power of the courts. *Kilberg* v. *United States*, 97 U. S., 398; *Martinsburg & Potomac Railroad* v. *March*, 114 U. S., 549; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S., 185; *United States* v. *Gosnell & Gleason*, 175 U. S., 602.

This doctrine was again considered by your honorable court as late as January 9, 1912, in the case of the *United States* v. *McMullen & Stulz* (No. 100,

October term, 1911), wherein Mr. Justice Holmes, speaking for the court, on this question, said:

> We deem what we have said sufficient to justify our conclusions without considering the argument of the solicitor general that the contractor was given a right to the extension of time if the Secretary of the Navy decided for it, and that the Secretary of the Navy is to be regarded as a third party and stranger to the contract rather than as representing the United States. See *United States* v. *Gleason*, 175 U. S., 588. Of course if the Secretary be so regarded the contractor's right is made out, as the extension would be independent of the will of the other party to the contract—the United States.

The Secretary of the Navy in this case, as in the McMullen case, must be considered as a third party, and Plumley, by the ninth section of his contract, bound himself to abide by the decision of the Secretary of the Navy on such questions, and the Secretary of the Navy deciding, as he did, against the appellant, the Court of Claims rightly held that he was not entitled to recover for this work.

WORK DONE BY CLAIMANT UNDER VERBAL PROTEST.

Findings IV, VI, VIII, IX, and XII set out work done by Plumley, but under verbal protest to the officer in charge. Finding VII, hereinbefore referred to under the heading "Laying 4-inch drain pipe," refers to work done by Plumley, though protesting in writing to the Secretary of the Navy.

Findings V, X, XI, XIII, and XIV have reference to work done by appellant without protest under the direction of the officer in charge and in accordance with said officer's construction of the contract plans and specifications. (R., 22.)

The work or alleged extra work set out in findings IV, V, VI, VIII, IX, X, XI, XII, XIII, and XIV *was never referred to the Secretary of the Navy*, as required by the ninth section of the Plumley contract. It would therefore seem that appellant Plumley at the time acquiesced in the ruling of the officer in charge when he required the work covered by said findings to be done by him. Otherwise he would have appealed to the Secretary of the Navy, under the said ninth section of his contract, as he did on the question of installing the ventilation system.

It will be noted that the alleged extra work covered by these findings set out work necessary to complete the buildings. For instance, it is stated in the 14th finding that "No saddles are specified in the specifications or shown in the plans." These saddles were for the doors in the main building. A saddle is a piece of material at the bottom of a door and over which the door stands when closed. The value of these saddles as fixed by the Court of Claims is $1.50. The question of saddles for the doors in the main building is one of the very minor details of construction, and section 2 of the McLaughlin contract was no doubt drawn for the purpose of providing for just such an emergency as the omission

from the drawings and specifications of such a small detail as these saddles. Said section in part provides:

> No omission in the drawings, plans, or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the parties of the first part, and all claims for extra compensation by reason of, or for or on account of, such extra performance are hereby, and in consideration of the premises, expressly waived. (R., 9.)

What has been said about the saddles for the doors in the main building could very well be said about all of the alleged extra work covered by findings IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV. All of the work covered by these findings was only matters of the minutest detail when compared with the magnitude of the work covered by the McLaughlin and Plumley contracts, which called for an expenditure of approximately $350,000.

CONCRETE AND ASPHALT IN CELLARS.

Finding V (R. 17) refers to the concrete and asphalt placed in cellars. The McLaughlin specifications provided under the head of concrete floors that the cellars were to be concreted throughout without exception, and then followed a sentence as follows: "Trowel off smooth and mark with marking tool, and finish equal to granolithic pavement." This last sentence was erased in the copy of the speci-

fications annexed to the Plumley contract, *thereby giving specific notice to the claimant Plumley that a coat of asphalt*, required by the specifications as set out in this fifth finding, was to be placed *upon this bed of concrete*. It was for that purpose that said sentence was erased by the drawing of a line through it in order that there would be no marking of lines in the concrete to show through the asphalt.

In the case of *Hughes* v. *United States*, supra, decided January 9, 1912, Mr. Justice Lurton, speaking for your honorable court, in part said:

> Knowing of the manner in which the mails carried by the three railroads in question were handled, acquired after the contract was signed, is not, of course, fatal to his contention that the contract did not include that mail matter. It does, however, appear that after his proposal had been accepted and before the beginning of performance he actually took a temporary contract, for the carriage of the identical mails, so that when he entered upon his own regular contract he was fully aware of the conditions. This must, at least, weaken the force of his going forward under protest. But aside from this information, *the advertisement and instructions warned him to* familiarize himself with the situation by personal investigation and inquiry. This he asserted he had done, for in his printed proposal he stated that, "This proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service and also after careful examination of the condi-

> tions attached to said advertisement and with intent to be governed thereby." (Italics ours.)

The McLaughlin specifications were part of the Plumley contract. They provided for the *placing of concrete with a cover of asphalt* in the cellars, and the claimant Plumley bound himself to place *both concrete and asphalt* in the cellars, as required by the specifications, when he signed the contract. In addition to this, the erasing of the sentence "Trowel off smooth and mark with marking tool and finish equal to granolithic pavement" *warned him that over this concrete the specification specially required a cover of asphalt*, as set out in said Finding V.

NONE OF THE ALLEGED EXTRA WORK WAS AGREED TO IN WRITING, AS THE CONTRACT REQUIRED.

The second paragraph of Finding XVI (R., 22) is as follows:

> Neither is it shown that any of the alleged extra work charged for in claimant's petition and set out in the findings of fact was contracted for in writing in accordance with the terms of section 3 of the original contract with McLaughlin & Co., which by the first clause of the Plumley contract was made a part of the contract involved in this case.

Section 3 of the McLaughlin contract, referred to above by the Court of Claims and hereinbefore partly set out, is as follows:

> Third. If at any time during the prosecution of the work it shall be found advantageous or necessary to make any change or

changes in the requirements of the drawings, plans, or specifications which may either increase or diminish the cost of the work, such change or changes must be agreed upon in writing by the parties of the first part and by the architect appointed by the Secretary of the Navy to superintend the work, the agreement to set forth fully the reason for such change or changes, to state clearly the quantities and prices of both material and labor thus substituted for those named in the plans and specifications, and, before taking effect, to be approved by the said Secretary: *Provided*, That the drawings, plans, or specifications shall not be changed in any respect when the cost of such change shall exceed five hundred dollars ($500) except upon the written order of the Secretary of the Navy, and that, if changes involving an expenditure in excess of said sum thus made, the actual cost thereof and the damage caused thereby shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, and the parties of the first part shall be bound by the determination of said board or of a majority thereof as to the amount of increased or diminished compensation which they shall be entitled to receive, if any, in consequence of such change or changes. (R., 9.)

This same question was before the Court of Claims in the case of *McLaughlin* v. *United States* (37 Ct. Cls., pp. 150, 197), and Mr. Justice Howry, delivering the opinion of the court, on this question said:

The claims for extra work and material rest upon what plaintiffs term the arbitrary disregard of their rights in the orders given by the architect's assistant. It is asked that these items be enforced upon an implied contract for a quantum meruit, and they are discussed by both sides upon their merits, irrespective of the apparent disregard of the terms of the contract excluding extras unless duly authorized.

The architects were without authority to order changes which increased the cost to the defendants where the expenditures were less than $500, unless an agreement setting forth fully the reasons and stating the quantities and prices was first approved by the Secretary of the Navy. The plans could not be changed when the cost exceeded $500, except upon the written order of the Secretary; and changes involving expenditures in excess of said sum, with the actual cost, had to be first determined by a board on changes. If extra work was done on the order of a subordinate having no authority to give the order, which increased the cost to plaintiffs, it is their misfortune. No contract can be implied, even though defendants may have reaped a material benefit, without proof of an order from the proper authority showing a waiver of the express provisions of the agreement. Extra work done on the order of the local assistant architect who supervised the work was prohibited. The contract could neither be enlarged nor changed by a subordinate, and even in the case of an assurance that additional compen-

sation would be allowed, such an agreement is inoperative and void. (*Hawkins* v. *United States*, 96 U. S., 689; *Ferris* v. *United States*, 28 Ct. Cls. R., 332; *Driscoll's case*, 34 Ct. Cls. R., 524.)

Section 3744 of the Revised Statutes provides that:

> It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof.

This section was before the Circuit Court for the Northern District of New York for consideration in the case of *Churchyard* v. *United States* (100 Fed. Rep., p. 920), wherein it was held:

> Under Rev. Stat., secs. 3714, 3744, as amended by 20 Stat., 36, and Army Regulations, par. 825, providing that all contracts for extras in the construction of Government buildings shall be in writing and made under the direction of the chief officer of the War Department, and that no expenditure of over $500 shall be made without the approval of the Secretary of War, no recovery can be had by a contractor for extra work, for items which were never the subject of any agreement, nor authorized by the officer in charge as extras, nor submitted by him to the War Department.

This same section 3744 of the Revised Statutes was considered by your Honorable Court in the case of

United States v. *McMullen & Stulz*, No. 100, present term, decided January 9, 1912, and Mr. Justice Holmes, speaking for the court, in part said:

> It is urged that the last-mentioned section dealing with changes deemed desirable by the Government requires that they, as well as the increased or diminished compensation, must be agreed to in writing by the parties to the contract before they are begun; and it is suggested that this requires the consent of the sureties. We do not read it so. We think that so far as this clause goes it contemplates an imperative right on the part of the Government to make a change, *but requires a writing as a condition of going on*. See Revised Statute sec. 3744. The same notion is repeated in the specifications with even more definite assumption that the Government may make changes if it sees fit. "Should it be to the interest of the Government to make any changes in the plans * * * the * * * compensation is to be determined," etc. (Italics ours.)

Not only does section 3744 of the Revised Statutes, which the courts have held to be mandatory, operate as a statute of frauds and prevents Appellant Plumley from recovering compensation for said alleged extra work, but the provision of the McLaughlin contract, section 3, which is also a part of the Plumley contract, prevents him from recovering unless the requirement of that section is complied with, to the effect that all changes either diminishing or increasing the cost of the contract be *agreed to in writing*. The findings show that this section of the McLaughlin-

Plumley contract was not complied with as to any of the alleged extras set out in the claimant's petition or the court's findings of fact.

THE DEFENDANT'S APPEAL.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the Government for $502.50 on the facts stated in Finding II, being premiums paid for insurance by claimant during the extended period of his contract.

Section 3 of the Plumley contract (R., 4–5) and section 10 of the McLaughlin contract (R., 10–11) cover the question of delay.

Section 10 of the McLaughlin contract is as follows:

> The delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the work within the period herein specified therefor shall entitle the parties of the first part to a corresponding extension of the period within which the work is to be completed.

The said Finding II states that—

> The contract time for the completion of the work was extended by the Secretary of the Navy to February 8, 1893, giving as a reason therefor that failure to complete the work within contract time was on account of circumstances beyond claimant's control. (R., 12.)

The second finding also states that the appellant Plumley was delayed in completing the buildings by the defendants in not having the architect on hand promptly for decisions pertaining to the same. (R., 12.) That part of said section 10 on the question of delays caused by the Government is as follows:

> *Provided*, however, that no delay attributed by the party of the first part to the Navy Department, its officers or agents, or the alleged cause or causes thereof, shall be considered by the Secretary of the Navy unless the parties of the first part shall at the time of the occurrence of such delay notify him in writing of the facts and circumstances in each case and of the extent to which they claim that the final completion of the work is thereby delayed. (R. 11.)

Said finding II further states:

> Neither is it shown that the claimant at the time of the occurrence of such delay notified the Secretary of the Navy in writing of the facts and circumstances thereof and the extent to which the final completion of the work would be thereby delayed. (R. 12.)

Appellant Plumley bound himself to notify the Government, as above stated, when the delay is chargeable to the United States. Not only does said provision of the said section 10 of the contract require him to give notice that the Government is chargeable with the delay, but he shall in writing at the time of the occurrence of such delay state all the facts and circumstances in each case and of the

extent to which he claims the final completion of the work will be thereby delayed. This he did not do.

The first part of section 10, to which Plumley *agreed*, provides that if the Secretary of the Navy shall find that delay is properly attributable to the Navy Department, the *claimant is entitled to a corresponding extension of the contract period* within which the work is to be completed. *No other provision is found in either the McLaughlin or Plumley contract providing for any damages by reason of delay chargeable to the Government.*

In the case of the *Merchants' Loan and Trust Company* v. *The United States* (40 C. Cls., p. 117) it was held that—

> Where extra time to the contractor is made the equivalent for delay caused by the defendants, and the claimant has not shown that such extra time was refused, there can be no recovery.

Mr. Justice Wright delivered the opinion of the Court of Claims in the above case and in doing so, in part, said:

> The question arising for decision on findings IV to IX, inclusive, is whether claimant can recover, under the clause of the contract quoted in the first finding, for the alleged damages for the delays caused by the defendants, as found and recited in the findings of the court.
>
> The legal effect of the part of the contract referred to is that the entire work covered by the contract was to be completed within eight

months from the date of the approval of the bond, and that any particular portion of the work should be completed within such reasonable time as might thereafter be definitely specified in written notice to the contractor, and should there be a failure to so complete the work in the time required the contractor should forfeit $200 per day as liquidated damages thereafter until the completion of the same, provided that if *through any fault of the defendants* the contractor should be delayed in the execution of the work included in the contract he should be allowed one day additional to the time stated for such completion for each and every day of such delay so caused by the defendants, and that no claim should be made or allowed for damages which might arise out of any delay caused by the defendants.

The provisions of the contract just recited are as valid and binding as any other part of it, and having been voluntarily entered into the contractor has agreed that no claim shall be made or allowed arising out of the delay caused by the defendants mentioned in the findings. Extra time to the contractor was made the equivalent for delay caused by the defendants; and the claimant has not shown that such extra time was refused by the defendants.

In respect to the right to recover damages for delays the contract is purely unilateral and is confined to such damages as might be caused by the contractor alone, and for the delays caused by the defendants there can be no recovery. [Italics ours.]

(40 Ct. Cls., pp. 117, 131–132.)

The findings in the Merchants' Loan and Trust Company case, above mentioned, show that that company during the period covered by the extension of the contract expended $240 for glass insurance and $480 for fire insurance, making a total of $720 for insurance claimed as damages in said case. (40 Ct. Cls., pp. 117, 122, 123, near top of two last-named pages.)

The Plumley contract contained provisions covering the question of damages as the result of delay, as did the contract in the Merchants' Loan and Trust Company case. Plumley by the 10th section of the McLaughlin contract, which is a part of the Plumley contract, obligated himself to accept a corresponding extension of time for any delay caused by the defendant (R., 10-11) and in doing so the contract period was extended as a result of the delay caused by the defendant. Section 5 of the Plumley contract provided for the insurance of the Naval Observatory buildings and appurtenances during the contract period. Said section is as follows:

> The buildings and appurtenances embraced by this contract and all materials and appliances provided for and used in the completion thereof, shall be kept duly insured, which insurance shall be renewed and increased from time to time, by and at the expense of the party of the first part. (R., 5.)

Both section 10 of the McLaughlin contract and section 3 of the Plumley contract provided that Plumley, at the time of any delay caused by the Government, should give notice "in writing of the facts

and circumstances in each case and of the extent to which they claim that the final completion of the work is thereby delayed." No such notice was ever given. No claim for damages or increased cost of construction was made at the time of the occurrence of any delay caused by the Government and which entitled claimant to a corresponding extension of the contract period.

The last sentence of the first paragraph of finding II (R., 12) states that "It is not shown that claimant suffered any loss by reason of said delay except the expenditure of $502.50, premiums paid upon insurance claimant was obligated to carry upon the work." *This insurance it is contended he was obligated to carry during the contract period which covers the term of extension by the fifth section of his contract.* (R., 5.)

The extension of the contract period by the Secretary of the Navy made no other change in the terms and provisions of the contract, and section 5, which obligated the claimant Plumley to keep the buildings and appurtenances insured at his expense, was still in force and effect and was so until the end of the contract period as extended.

On page 8 of the brief filed herein by counsel for Plumley several cases are cited as authority for the allowance of the cost of insurance as one item of damage resulting from delay caused by the Government. The latest case is that of *Cramp & Sons* v. *The United States* (216 U. S., 494). The findings of fact in this case are reported in 43 Ct. Cls., p. 202, and the item of insurance is set out near the middle

of page 214. An examination of the findings fails to disclose any provision in the Cramp contract providing that "The delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the work within the period herein specified therefor shall entitle the parties of the first part to a corresponding extension of the period within which the work is to be completed," as does the 10th section of the McLaughlin-Plumley contract in the present case. (R., 10.)

The provision of the Plumley contract obligating him to accept an extension of the contract period as a result of delay caused by the Government is as binding as any other provision of his contract. The courts have frequently held that it was proper for the parties to a contract to fix definitely and specifically the damages in the event of a breach or delay chargeable to either party. (*Bethlehem Steel Company* v. *United States*, 205 U. S., 105.) In the present case extra time to the contractor was made the equivalent of delay caused by the defendant, and no other damage or relief was given him by his contract. Where a contract provides for fixed and settled damages in the event of a breach or delay, the terms of the contract on this question should control and the courts should not give relief to the contractor for damages other than those set out in the contract. To do so nullifies the damage provisions of contracts.

The findings state that Plumley suffered no other loss and he made no claim for any increased cost of construction, insurance, or damage as a result of this delay at the time of its occurrence, and in not doing so he waived any right he might have had to compensation for increased cost of insurance or construction as a result of the delay caused by the defendant.

In the case of *United States* v. *Gleason* (175 U. S., pp. 588, 609) no forfeitures were declared at the time of the several extensions of the Gleason contract, and your honorable court held that failing to declare forfeitures at the time of the several extensions they must be considered as waived. Mr. Justice Shiras, in closing the opinion of the court in the Gleason case, on this question, said:

> As no actual damage or loss was definitely shown to have been suffered by the Government by reason of the noncompletion of the work, and as no forfeitures were declared at the time of the several extensions, and may therefore be deemed to have been waived, we affirm that portion of the judgment of the court below allowing a recovery for the retained percentages of the compensation for work actually done and accepted.

If the Government by failing to declare forfeitures at the time of the several extensions in the Gleason case, waived them, Plumley likewise waived his right for any additional or extra compensation as a result of the extension of his contract by not making it known in writing to the Secretary of the Navy at the time of the occurrence of such delay.

It is therefore respectfully submitted that the action of the Court of Claims in rendering judgment against the Government for $502.50 on the facts stated in the second finding should be reversed and its decision otherwise affirmed, with instructions to dismiss claimant's petition.

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